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DESCRIPTION OF THE RECORD

The record consists of the following: (1) the September 18, 2007 testimony deposition of Janice Anderson, filed by Opposer on September 28, 2007; (2) Opposer's September 28, 2007 Notice of Reliance; (3) the September 20, 2007 testimony deposition of Robert D. Planck, filed with the Board by Applicant on November 26, 2007; (4) the September 20, 2007 testimony deposition of Robert Fontana, filed by Applicant on November 26, 2007; and (5) Applicant's November 26, 2008 Notice of Reliance.

To streamline the proceedings and to reduce the amount of papers filed with the Board, the parties have agreed to treat the discovery depositions of three witnesses – Janice Anderson, Robert Plank, and Robert Fonatana – as trial testimony. Because each party has filed the transcripts from those depositions with the Board under cover of its Notice of Reliance, the record additionally consists of the following testimony: (1) the August 17, 2006 discovery deposition of Janice Anderson; (2) the August 22, 2006 discovery deposition of Robert D. Planck; and (3) the August 22, 2006 discovery deposition of Robert Fontana.

This brief therefore uses the following conventions when citing to the testimony of record in this case: (1) "Anderson Dep. Vol. I" for the August 17, 2006 discovery deposition of Janice Anderson; (2) "Anderson Dep. Vol. II" for the September 18, 2007 testimony deposition of Janice Anderson; (3) "Planck Dep. Vol. I" for the August 22, 2006 discovery deposition of Robert D. Planck; (4) "Planck Dep. Vol. II" for the September 20, 2007 testimony deposition of Robert D. Planck; (5) "Fontana Dep. Vol. I" for the August 22, 2006 discovery deposition of Robert Fontana; and (6) "Fontana Dep. Vol. II" for the September 20, 2007 testimony deposition of Robert Fontana.

STATEMENT OF THE ISSUES

This case presents two issues for the Board's resolution:



(1) whether Applicant has committed fraud on the Patent and Trademark Office by falsely averring a bona fide intent to use its mark in connection with certain goods recited in the application at the date of the application's publication; and

(2) whether Applicant's COBBLESTONE MARKET mark is likely to be confused with Flowers' prior-used COBBLESTONE MILL mark when used in connection with closely related goods.

I. FACTUAL BACKGROUND

A. Flowers' Rights to its COBBLESTONE MILL Mark

Opposer Flowers Bakeries Brands, Inc. is the owner of the COBBLESTONE MILL trademark, which it has continuously used in commerce in connection with bakery goods since at least as early as August 19, 1983. (Opposer's First Not. of Reliance, Ex. 1.) Prior to the December 6, 2005 filing date of the application underlying this proceeding, Flowers had secured the following registrations of its mark:

Mark	Goods	Registration Date
COBBLESTONE MILL	Bakery products, namely bread, buns and rolls.	August 6, 1996
	Bakery products-namely, bread, buns and rolls.	March 19, 1985
	Bakery products.	September 9, 2003

(Exs. 1-3 to Opposer's First Not. of Reliance.)

Over the last several decades, Flowers has expended considerable sums of money into developing consumer brand recognition for the COBBLESTONE MILL marks. In 2006, Flowers spent over \$400,000 advertising COBBLESTONE MILL goods, and the 2007 advertising budget was \$600,000. (Anderson Dep. Vol. II at 76.) Flowers' COBBLESTONE MILL goods have been advertised in various magazines with national distribution of over five million readers, and at cooking and other special events. (See *id.* at 9-10, 46-47.) Flowers also advertises its COBBLESTONE MILL goods in prominent grocery store displays throughout the store. (Anderson Dep. Vol. I at 24, 53.) Not only are Flowers' COBBLESTONE MILL goods featured on grocery store shelves and special display racks, but they also are featured or visible in deli shops:

[O]ftentimes in deli shops where we sell our bread, it is frequently on the counter in clear view of the consuming public as the person there that's making a sandwich. She's clearly taking it from a Cobblestone Mill package.

(Anderson Dep. Vol. I at 93-94.) Flowers also promotes the COBBLESTONE MILL marks and the goods offered under those marks on its web sites at www.flowersfoods.com and www.cobblestonemill.com. (Anderson Dep. Vol. I Ex. 1, Opposer's First Not. of Reliance, Ex. 9.) As a result of widespread advertising and promotion by Flowers and its licensees, Flowers' COBBLESTONE MILL marks have acquired a high degree of recognition, fame, and distinctiveness as a symbol of the high quality food products, namely bakery products, offered by Flowers and its licensees prior to the filing date of Applicant's application. (Anderson Dep. Vol. I at 58 ("Our consumer awareness is very high, and when we do studies, we find that consumers...are familiar with Cobblestone Mill.")) Recognition of Flowers' goods offered under the COBBLESTONE MILL Marks is so high that consumers often refer to the mark simply as

“Cobblestone.” (Anderson Dep. Vol. I at 54 (“[W]e have found in consumer research that...[t]he retail consumer often refers to our mark as just Cobblestone.”).)

Flowers’ sales of goods under the COBBLESTONE MILL Marks further reinforces and increases the strength of the marks. For example, in August 2006, Flowers’ anticipated annual sales of COBBLESTONE MILL goods for 2006 were \$105,000,000, and Flowers’ annual sales for 2005 were approximately \$100,000,000. (Anderson Dep. Vol. I at 26.) The public and retail buyers are familiar with and identify Flowers’ marks with Flowers, and, by reason of this identification, goods associated with the marks are understood by the public and trade to be produced, marketed, and supplied under Flowers’ authority or otherwise derived from Flowers.

As a result of these and other uses, the COBBLESTONE MILL marks are entitled to a broad scope of protection.

B. The Adoption and Intended Use of Applicant’s Mark.

Applicant is a limited partnership consisting of six independent food service distributors. (Planck Dep. Vol. I at 11.) As described by Applicant’s president,

[I]ndependent food service distributors . . . implies you’re not part of a public corporation. They’re privately-owned companies and they all provide services to the food service marketplace, to restaurants, hotels, prisons, colleges, universities, daycare centers, hospitals, any place that good would be consumed in an either away-from-home environment, and they distribute food to those . . . properties, food and food-related items.

(*Id.* at 12.)

When Applicant undertook the program that it ultimately marketed under the COBBLESTONE MARKET mark, “we had in mind . . . cheeses and this whole series of products, and perhaps some others, that would be sold in a market environment, similar to each of our national – national distributor competitors [who] have a brand position for the food service trade under – under their own proprietary brands.” (*Id.* at 23.) Applicant’s original choice of mark was COB-

BLESTONE CORNER, which it intended to use in connection with "Deli items similar to Boar's Head brand at retail." (*Id.* at 22-23.) Applicant abandoned consideration of that mark after reviewing the results of a trademark availability search for it. Significantly, the same search identified Flowers' prior claims to the COBBLESTONE MILL mark, and, indeed, an initial draft opinion from Applicant's outside trademark counsel warned Applicant that it "should anticipate" a challenge from Flowers. For reasons that are undetermined, however, this warning was omitted from the final draft of the opinion. (Planck Dep. Vol. I at 32-34 & Ex. 8.) Nonetheless, the final draft still warned of the risk presented by Flowers' prior registration: "Assuming publication [of the COBBLESTONE MARKET application], the owner of the "Cobblestone Mill" mark for bakery products...could try to oppose registration – note that the owner of "Cobblestone Mill" mark is Flowers Bakeries Brands, Inc. (Fontana Dep. Vol. I Ex. 2.)

Applicant eventually settled on the COBBLESTONE MARKET mark that is the subject of this opposition:

Q. . . . Is this mark intended to remind customers of a traditional deli?

A. It's intended to remind them of a market and of deli foods. The primary customer that we sell is restaurants and institutions, but even those accounts want to think of themselves as selling a premium product, which delis and markets conjure up.

(Planck Dep. Vol. I at 38.)

Although Applicant has suggested at varying times in the prosecution of its application that its customers are sophisticated operators of food service companies, the record is replete with acknowledgements that its current and future promotional strategies will place its mark directly in front of lay consumers who make "downstream" purchases from Applicant's initial customers:

Q. I've seen some references in the documents to kiosks. What are the company's plans for kiosks?

A. The kiosk concept is a service to – to customers. And, in most cases, those kiosks are – exist in college and universities or business and industry-type of environments. The operator usually wants to provide some sort of restaurant-ish kind of look, without the franchise fees. So Sysco, US [Foodservice], and now [we] offer product concepts so they can package together to have a San Pablo Mexican kind of environment, with Mexican products, et cetera, or Italian or deli-type products.

....

Q. Are there plans to use the Cobblestone [Market] mark in connection with kiosks?

A. Yes, there are.

Q. So, the kiosk presentation would be one in which the ultimate consumer would be exposed to trademarks used on the kiosks?

A. Yes, they would be exposed to the trademark and the component products . . . that were displayed and sold there.

Q. For those of your customers who operate delis, are the goods sold in those delis ever displayed to consumers, the ultimate consumers, in a way that displays the trademarks?

A. For operators that have display cases that are conveying a purely deli image, the answer would be yes.

(Planck Dep. Vol. I at 51-52.)

Q. [Applicant's] merchandising policy indicates that the Cobblestone Market name and logo may be used on point of sale materials, napkins, food wraps and containers; is that correct?

A. Yes.

....

Q. And what would be the purpose of using the Cobblestone Market, the name and logo, on those types of items?

A. To merchandise your – your concept.

Q. To merchandise the concept. In what way? Could you explain that just a little more?

A. Just to bring brand awareness to the end user on your – on your concept.

Q. To the end user?

A. Right.

....

Q. The merchandising policy lists different items, different approved merchandising items. Who are those items distributed to?

A. They could be distributed to the – the operator, the owner of the establishment, or the school mom or the manager of the college feeding [sic] or the restaurant patron.

(Fontana Dep. Vol. I at 21, 23.) Marketing materials bearing the COBBLESTONE MARKET mark that have been displayed directly to end consumers in this manner include posters, pickle jars, visors, buttons, and aprons for food service workers, price tags, price tag holders, static cling window stickers, "ceiling dangles," menu boards, and table umbrellas. (Fontana Dep. Vol. II at 31-38.)

Applicant has also acknowledged that there is an increasing convergence between the foodservice channel through which it claims to distribute its goods and the supermarkets through which Flowers markets most of its goods under the COBBLESTONE MILL mark:

Q. Would [the deli items offered under the COBBLESTONE MARKET mark] be offered in delis or in a deli setting as well?

A. Yes.

Q. Would breads be offered in a deli or deli setting?

A. Yes.

(Fontana Dep. Vol. I at 16-17.)

Q. You testified earlier . . . that your members are food service oriented. Do you mean by that that's all they do?

A. That is the majority of what they do.

Q. What would be the other activities not falling into the majority of their activities?

A. Okay. To reference more and more the supermarket deli has become more of a food service entity than a retail entity. The deliveries to whose units are – can be food service driven and are – have more of a food service look than a retail look.

Q. . . . Let me make sure I understand your last testimony correctly. The supermarket deli is becoming an increasingly larger segment of the food service channel?

A. The food – the retail deli is acting and looking more like a food service channel than retail channel.

Q. And if that is the case, would that mean that your six members would have a greater share of that supermarket deli, say, than they did ten years ago?

A. Yes. Potentially, yes.

Q. You said potentially. Do you think that it is or is not a larger setting?

A. I think that it is a larger setting than it was ten years ago.

(Fontana Dep. Vol. II at 39-40.)

Not only are the deli meats, cheese, and other food items offered through the same channels, but Applicant's promotional items also are distributed to and viewed by the same end consumers as those of Applicant's goods:

Q. And particularly with the napkins and food wraps, containers, anything like that, that's something that would ultimately be used by the restaurant patrons?

A. Yes. . . . It would be used by both the – our customer, the operator, and the restaurant patron.

(Fontana Dep. Vol. I. at 23.)

C. Procedural History of Applicant's Application

On June 4, 2004, Applicant filed application Serial No. 78/432642 to register the COBLESTONE MARKET mark. As originally filed, the application recited a bona fide intent to use the mark in connection with the following goods:

Deli meats, cooked deli items, cheese, refrigerated salads, pickles, bagged potato chips, frozen soups and entrees, in Class 29; and

Deli mustard, in Class 30.

(Ex. 10 to Planck Dep. Vol. I.)

In August of 2005, Applicant amended its identification of goods to include "vegetables" in International Class 29 and "sandwiches" in International Class 30. As published on September 30, 2005, Applicant's application therefore recited the following goods:

Deli meats; cooked deli items, namely, soups, and vegetables; cheese; refrigerated salads except macaroni, rice, and pasta salad; pickles; bagged potato chips, frozen soups; frozen entrees, namely, entrees consisting primarily of meat, fish, poultry or vegetables, in Class 29, and

Deli mustard; cooked deli items, namely, sandwiches, in Class 30.

(Ex. 11 to Planck Dep. Vol. I; *see also* Fontana Dep. Vol. I at 18-20.)

During the discovery deposition of Applicant's president, Flowers learned that Applicant was without the required bona fide intent to use the mark in connection with all the goods covered by the application. Flowers therefore sought and received leave of the Board to amend the Notice of Opposition to allege that Applicant had prosecuted the application through fraudulent filings. Applicant in turn received leave from the Board to delete "vegetables" and all goods in Class 30 from its application.

II. APPLICANT'S MARK SHOULD BE REFUSED REGISTRATION

A. At the Time of Publication, Applicant's Allegations of a Bona Fide Intent to Use Were Fraudulent.

Applicant's mark should be refused registration because the testimony of Applicant's principals demonstrates that Applicant's recitations of an intent to use the mark in connection with certain goods, namely, deli mustard, sandwiches, and vegetables, were fraudulent. Although the first of these goods was recited in the original application, the second and third were added in August of 2005 in response to an office action. As set forth below in greater detail, Applicant's post-publication amendments to remove those goods cannot cure its fatal incorporation of them into the application prior to the application's publication for opposition.

At the outset, there is no dispute that applicant has always lacked a bona fide intent to use its mark in connection with vegetables. Not only has Applicant failed to produce any objective documentary evidence of its intent to use the mark with these goods, its president has confirmed that no such intent *ever* existed:

Q. . . . [D]oes the company ultimately intend to sell vegetables as a separate item?

A. Not under this brand.

(Planck Dep. Vol. I at 45.)

Q. Is it the point of [Applicant's August 2, 2005 amendments] that the word vegetables was added to that identification of goods as well?

....
A. I don't remember. I do know that vegetables were always intended as a component of salads.

....
Q. What about vegetables standing alone?

A. I don't – *I believe our intention was always those were components of other products.*

Q. So to the extent that . . . a vegetable would appear in an IMA product, it would be a component of soup, for example?

A. Yes, it could be.

Q. Or as a component of the frozen entrees?

A. Could be.

Q. Okay. But not, for example, a bag of broccoli?

A. *That was never – no, that was never our intent.*

(Planck Dep. Vol. II at 50-51 (emphasis added).)

It is equally apparent that Applicant did not have a bona fide intent to use its mark in connection with sandwiches. For example, Applicant's response to Flowers' Interrogatory No. 4 reads as follows:

4. Describe the typical or target customer to whom Applicant intends to offer or is offering goods under the Opposed Mark.

ANSWER

....
Our client sells Deli Meats, Cheeses, Pickles, Prepared Salads, grab and go chips and Soups under the COBBLESTONE MARKET brand. *There is no intention to sell sandwiches under this brand*, but the sandwich may include branded Deli Meats, Cheeses and Pickles as components of such a sandwich.

(Ex. 4 to Opposer's First Not. of Reliance at 2-3 (emphasis added).)

This admission against interest is consistent with discovery and trial testimony of Applicant's president:

Q. . . . What about the sandwiches, the last item?

A. Well, we don't sell sandwiches prepared, we never have, under any brand of our own. . . . And, you know, frankly, I added in this thing as to some point . . . as an afterthought, gee, someday we might sell sandwiches. *The fact is, we don't, we have no intention to produce sandwiches*

(Planck Dep. Vol. I at 49 (emphasis added).)

At trial, Applicant attempted to rehabilitate its showing on this point by alleging discussions with a third-party vendor of sandwiches that might have resulted in the mark's use with those goods. That testimony, however, demonstrates only that Applicant failed to have the required intent *as of the filing date of its application*:

Q. So is it fair to say that originally you didn't intend to include sandwiches within the description?

A. That's correct.

....

Q. And just some questions to make sure I understand the timetable here, [the third party] approached [Applicant] after the filing of the original application but before it was amended with this document [to add sandwiches]?

A. I believe that's correct.

Q. And it was a result of that contact that [Applicant] developed an interest in sandwiches?

A. Yes, it was a result of that contact and also seeing things at food shows but additionally it was a result of the PTO's request. So they all kind of happened in conjunction with each other.

(Planck Dep. Vol. II at 23, 48-49.)

Of equal importance, that testimony also demonstrates the complete absence of any objective documentary evidence of Applicant's intent to use its mark with sandwiches even during the brief period in which it claims to have had one:

Q. What [third party sandwich vendor] was that?

A. I honestly don't remember the name of the company. They made prepared sandwiches probably for vending or something else.

Q. Do you have any correspondence from that company that might identify it?

A. I don't think so.

....

Q. . . . During the time the company had an interest in sandwiches, did it generate any documentary evidence of that interest?

A. No, not to my knowledge

Q. Any marketing studies?

A. No marketing studies.

Q. Any advertising?

A. Well, we don't do any advertising, no. . . .

Q. . . . Did any of your member companies generate any advertising materials?

A. On products? On that product line?

Q. For sandwiches in particular.

A. No.

(Planck Dep. Vol. II at 48-50.)

The situation is the same with respect to deli mustard. Once again, Applicant has failed to produce any objective documentary evidence of its alleged bona fide intent to use its mark in connection with this particular good, and the testimony of its president explains why it cannot do so:

Q. . . . Let's jump to the next class of goods, deli mustard. How would you provide that to your customers?

A. Well, in this class of goods, it was probably an afterthought of, gee, we might do that some day.

(Planck Dep. Vol. I at 47.)

Applicant's president has acknowledged that "[b]ona fide must mean real and intention is a plan, and so I'd say it would be a real plan to use." (Planck Dep. Vol. I at 56.) Here, it is apparent that Applicant did not have such a real plan where vegetables, sandwiches, and deli mustard are concerned. Specifically, and to reiterate, Applicant has conceded that it *never* intended to market vegetables under its mark, that its short-lived interest in sandwiches *post-dated* the filing date of its application, and that the inclusion of deli mustard in the original application was nothing more than an "afterthought." Moreover, even if Applicant were not precluded by these admissions against interest from establishing even a *subjective* bona fide intent to use its mark in connection with these goods, it has failed to produce any *objective* evidence of that intent. See S. Rep. No. 100-515, at 23 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5577, 5587 ("In connection with the [Lanham Act's intent to use provisions], 'bona fide' should be read to mean a fair, objective determination of the applicant's intent based on all the circumstances."); *see also Medinol*

Ltd. v. Neuro Vasx Inc., 67 U.S.P.Q.2d 1205, 1209 (T.T.A.B. 2003) (“The appropriate inquiry is . . . not into the registrant’s subjective intent, but rather into the objective manifestations of that intent.”).

Under these circumstances, Applicant’s recitations of a bona fide intent to use its mark are false and mandate the rejection of its application, *regardless of any post-publication amendments to its identification of goods that Applicant may have made*. The Board has long recognized that there is no need for a registration to issue before a fraud-based challenge to an applicant’s sworn averments may be brought. *See, e.g., Commodore Ltd. v. CBM Kabushiki Kaisha*, 26 U.S.P.Q.2d 1503 (T.T.A.B. 1993) (allowing amendment of notice of opposition to add allegation that applicant lacked bona fide intent to use mark in connection with goods identified in application); *First Int’l Servs. Corp. v. Chuckles, Inc.*, 5 U.S.P.Q.2d 1628, 1636 (T.T.A.B. 1988) (finding fraud on basis of inaccurate recitation of actual use in commerce). The reason for this rule is apparent:

The timing of the misrepresentation is immaterial. Whether the false statements alleging use of the mark in commerce occur at the time of the filing, during the application process, or at a later point during the USPTO’s review of the statement of use, the result is the same—an application results in a registration improperly accorded legal presumptions in connection with goods or services on which the mark is not used. [There is] no compelling argument as to why the law allows for cancellation of a registration after it is obtained through fraud, but does not allow for the prevention of a registration when fraud is revealed and the issuance of a registration is imminent.

Hurley Int’l LLC v. Volta, 82 U.S.P.Q.2d 1339, 1344 (T.T.A.B. 2007) (footnote omitted).

Applicant’s post-publication amendment to its application does not affect the applicability of this rule. The Board repeatedly has rejected registrants’ attempts to cure past false recitations of actual use through similar deletions. As *Medinol Ltd. v. Neuro Vasx Inc.*, 67 U.S.P.Q.2d 1205 (T.T.A.B. 2003) explains, “[a]llowing [a] respondent’s amendment would be beside the

point; even if [problem goods] were deleted from the registration, the question remains whether [the] respondent committed fraud upon the office in the procurement of the registration.” *Id.* at 1208; *Hachette Filipacchi Presse v. Elle Belle LLC*, 85 U.S.P.Q.2d 1090, 1095 (T.T.A.B. 2007) (“[R]espondent’s amendment would not serve to cure the fraud that was committed.”). Moreover, the critical date for purposes of this inquiry is the accuracy of a registrant’s averments as of the filing date of its application. *See id.*; *accord Hachette Filipacchi Presse*, 85 U.S.P.Q.2d at 1092 (sustaining cancellation action on ground that “[t]here is no dispute and, in fact, respondent admitted that it had not used its mark in connection with a significant number of the listed goods at the time it filed an application based on use in commerce which included a signed declaration attesting to the truth of all the statements in that application”); *Standard Knitting*, 77 U.S.P.Q.2d 1926 (“The critical question is whether the marks were in use in connection with the identified goods as of the . . . filing date of the use-based applications . . .”).

These principles apply with equal force in the context of an opposition to a pending application. A sworn recitation of the basis of an application must be accurate as of the application’s filing date. *See Hurley Int’l*, 82 U.S.P.Q.2d at 1344 (“In this instance, the law is clear that an applicant may not claim a Section 1(a) filing basis unless the mark was in use in commerce on or in connection with *all* the goods and services covered by the Section 1(a) basis as of the application filing date.”); *see also Sinclair Oil Corp. v. Kendrick*, 85 U.S.P.Q.2d 1032, 1037 (T.T.A.B. 2007) (“Applicant has pointed to no use of the mark in connection with any retail store services that would have provided applicant with any basis for claiming that the mark was in use in commerce when she filed her use-based application.”). Moreover, as in the cancellation context, the amendment of a pending application will not cure fraud that existed as of that filing date. *See Hurley Int’l*, 82 U.S.P.Q.2d at 1346 (denying as moot a motion to amend the chal-

lenged application on ground that “the proposed amendment does not serve to cure a fraud that was committed”); *see also Sinclair Oil Corp. v. Kendrick*, 85 U.S.P.Q.2d 1032, 1033-37 (T.T.A.B. 2007) (sustaining fraud-based challenge to application despite having previously allowed amendment to change basis).

Had the examining attorney assigned to Applicant’s application known the true facts underlying Applicant’s alleged bona fide intent to use its mark in connection with all of Applicant’s recited goods as of the filing date of the application, the application would not, and *could* not, have been passed to publication. *See Hachette Filipacchi Presse*, 85 U.S.P.Q.2d at 1092; *Hurley Int’l*, 82 U.S.P.Q.2d at 1344. Moreover, Applicant and its principals “were certainly in a position to have personal knowledge of the facts concerning their own [intent to] use . . . their mark on the [goods] identified in their application.” *Hurley Int’l*, 82 U.S.P.Q.2d at 1345; *see also Sinclair Oil*, 85 U.S.P.Q.2d at 1036. Finally, Applicant’s sworn representations of a bona fide intent to use remain false at the time they were made, whether or not the goods in question were ultimately deleted from its application. *See Medinol*, 67 U.S.P.Q.2d at 1208. These circumstances mandate the refusal of registration to Applicant’s mark on the ground that Applicant’s representations to the Office were fraudulent in nature.

B. Confusion is Inevitable Between Applicant’s COBBLESTONE MARKET Mark and Flowers’ COBBLESTONE MILL Marks.

Independent of Applicant’s false recitations of a bona fide intent to use its mark, the Board should deny registration because Applicant’s mark is likely to be confused with Flowers’ prior-used and prior-registered registered mark.

1. Flowers is the Prior User.

As a threshold matter, priority of use is not at issue in this case. Applicant has alleged no date of actual use. Having filed an intent-to-use application, Applicant is not entitled to any date

of use prior to the filing date of its application, namely, June 9, 2004. Flowers' pleaded registrations establish that Flowers' COBBLESTONE MILL marks have been in use for more than twenty-five years. (Exs. 1-3 to Opposer's First Not. of Reliance.)

2. The *du Pont* Factors of Record Confirm That Confusion Between the Parties' Marks is Likely if Not Inevitable.

The determination whether a likelihood of confusion exists between marks is governed by the factors set forth in *In re E.I. du Pont DeNemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973):

The following, when of record, must be considered: (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use. (3) The similarity or dissimilarity of established, likely-to-continue trade channels. (4) The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing. (5) The fame of the prior mark (sales, advertising, length of use). (6) The number and nature of similar marks in use on similar goods. (7) The nature and extent of any actual confusion. (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion. (9) The variety of goods on which a mark is or in not used (house mark, "family" mark, product mark). (10) The market interface between applicant and the owner of a prior mark.... (11) The extent to which applicant has a right to exclude others from use of its mark on its goods. (12) The extent of potential confusion, i.e., whether *de minimis* or substantial. (13) Any other established fact probative of the effect of use.

476 F.2d at 1361. To prevail, Flowers is not required to prove that all, or even most, of these factors favor a likelihood of confusion. *See id.* at 1362. In fact, however, all factors for which there is record evidence favor Flowers.

(a) The Parties' Marks Are Confusingly Similar.

Confusion is likely because Applicant, with both constructive and actual knowledge of awareness of Flowers' prior rights, selected a mark that captures a phonetically, visually, and conceptually similar form of Flowers' COBBLESTONE MILL Marks. A junior user need not

adopt a mark identical to that of a senior user to support a finding of likely confusion. *See, e.g., Fisons Horticulture Inc. v. Vigoro Indus.*, 30 F.3d 466, 477 (3d Cir. 1994) (“[T]rademark infringement does not require exact copying of the trademark [M]arks need not be identical, only confusingly similar.”); *Jews for Jesus v. Brodsky*, 993 F. Supp. 282, 296 (D.N.J. 1998) (“In order to constitute infringement, exact similarities are not required between the allegedly confusing marks.”). As the Board previously has explained, “it is a fundamental tenant of our trademark law that exact similitude is not required to conclude that two marks are confusingly similar.” *Hercules, Inc. v. Nat’l Starch & Chem. Corp.*, 223 U.S.P.Q. 1244, 1246 (T.T.A.B. 1984).

Nevertheless, “the greater the similarity in the design of the trademarks, the greater the likelihood of confusion.” *Exxon Corp. v. Texas Motor Exch.*, 628 F.2d 500, 505 (5th Cir. 1980). Here, the term COBBLESTONE is the first and most prominent word component of each mark at issue. As in *Palm Bay Imports Inc v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369 (Fed. Cir. 2005), “[t]he presence of this strong distinctive term as the first word in both parties’ marks renders the marks similar, especially in light of the largely . . . non-source identifying significance of the word[s]” following it. *Id.* at 1372-73 (internal punctuation omitted); *see also Presto Prods., Inc. v. Nice-Pak Prods., Inc.* 9 U.S.P.Q.2d 1895, 1897 (T.T.A.B. 1988) (finding that it is the first part of a mark that is most likely to be impressed upon the mind of a purchaser and remembered).

Indeed, because Applicant has disclaimed the descriptive word “market,” the significance of the word in Applicant’s mark does not merit extended analysis. The disclaimer confirms that “market” is a “weaker and less dominant portion” of the mark, and “makes a lesser impact on the ordinary customer.” *See* 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:72 (4th ed. 2008). Specifically:

[D]isclaimed descriptive words in a mark should not be given the same prominence as that portion of the mark which possesses all of the qualities of a valid technical trademark. It is true that the general rule is that marks should be regarded in their entirety, including disclaimed words, but we do not think it could well be argued that disclaimed descriptive words could ever constitute the dominant part of a mark.

....

Inasmuch as the disclaimed words are clearly not registrable, apart from the mark shown, any one has the right to use those words in a descriptive way, if descriptive of his merchandise. It therefore seems to us that the disclaimed words, although they are a part of the mark, could only in a very minor degree indicate origin of goods in the [junior user].

Am. Brewing Co. v. Delatour Beverage Corp., 100 F.2d 253, 255 (C.C.P.A. 1938); *accord Am. Throwing Co. v. Famous Bathrobe Co.*, 250 F.2d 377, 381 (C.C.P.A. 1957); *see also Lone Star Steakhouse & Saloon v. Alpha of Va.*, 43 F.3d 922, 926 n.1 (4th Cir. 1995) (“[C]ourts should concentrate on the words not disclaimed in assessing the likelihood of confusion necessary for trademark infringement”). Simply put, “[t]he fact of a disclaimer is evidence that the disclaimed portion was descriptive, weak, and *the dominant part of the composite is the remainder.*” 3 MCCARTHY, *supra*, § 19:72 (emphasis added).

Indeed, Applicant has acknowledged that it did not even search any mark that included the term “market”:

Q: Do you know whether there was any search obtained to determine the availability of any mark that included the term “market”?

A: Not off the top of my head.

Q: Do you know whether there were any focus groups or other branding or advertising studies done in connection with the term “market”?

A: Not to my recollection.

(Fontana Dep. Vol. I at 12.)

Q: ... Has [Applicant] ever run a trademark search for the word “market”?

A: As a separate freestanding word, no, we have not.

Q: Has it run one for the word as part of a larger mark?

A: I don’t believe so.

(Planck Dep. Vol. I at 55.)

Of equal importance, the incorporation of "market" into Applicant's mark would not make a difference even if it had not been disclaimed. Indeed, the second term of Applicant's mark increases its phonetic similarity to Flowers' marks, as Applicant has paired the term COBBLESTONE with a word, "market," which begins with the same letter as the second word of Flowers' marks, "mill." The two words are conceptually similar as well, as when combined with the first term, "cobblestone," both convey the image of a rustic or artisan setting on cobblestone streets. Even when considered in their entirety, therefore, the COBBLESTONE MILL and COBBLESTONE MARKET marks both connote places where bakery and other food items goods are produced or sold.

(b) The Parties' Goods Are Closely Related and Used in the Same Context.

The parties' respective goods need not be identical to support a finding of a likelihood of confusion. *Hercules Inc.*, 223 U.S.P.Q. at 1247. Rather, a likelihood of confusion may exist if the goods bear some relationship to another and could be encountered by the same persons in a manner or under circumstances suggesting a common source. *See Luzier, Inc. v. Maryln Chem. Co.*, 442 F.2d 973, 975, 169 U.S.P.Q. 797, 799 (C.C.P.A. 1971) (finding a likelihood of confusion between LUMAR for "powdered fabric softener" and LUMAR for "massage cream"); *Freedom Sav. & Loan Ass'n v. Fid. Banks Life Ins. Co.*, 224 U.S.P.Q. 300, 304 (T.T.A.B. 1984) ("[I]t is not necessary as a matter of trademark law that goods or services be competitive or be sold together or through the same outlets if they can be shown to be related in some manner that would suggest to persons encountering them, even at different locations, sources, or offices, a likelihood of common sponsorship.") (finding likelihood of confusion between FREEDOM for insurance underwriting skills and FREEDOM for savings and loan association services, FREEDOM MORTGAGE for mortgage loan services, FREEDOM ACCOUNT for banking services,

and FREEDOM CARD for banking services). The key inquiry is whether the parties' goods and services are "related in some manner" such that they would give rise to the "mistaken belief that they originate from or are in some way associated with the same producer or provider." *In re Azteca Rest. Enters.*, 50 U.S.Q.P.2d 1209, 1210-11 (T.T.A.B. 1999); *see also On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1086 (Fed. Cir. 2000) (affirming Board's refusal to register a mark for Internet connection services because of a likelihood of confusion with a similar mark for closely related electronic content services). Furthermore, the greater the similarity between the marks, the lesser the degree of similarity required between the parties' products or services to support a finding of likelihood of confusion. *See, e.g., Century 21 Real Estate Corp.*, 970 F.2d at 877; *see also Helene Curtis Indus. v. Suave Shoe Corp.*, 13 U.S.P.Q.2d 1618 (T.T.A.B. 1989).

Here, there is no question that the parties' goods are similar and closely related. Flowers' goods are bakery products, namely breads, buns, and rolls, which frequently are used in sandwiches. Applicant's goods are sandwich components and side items, including deli meats, cheese, and deli mustard, and sandwich accompaniments, including soups, refrigerated salads, vegetables, bagged potato chips, and pickles. It is therefore entirely possible that a delicatessen might offer a sandwich made with COBBLESTONE MILL bread and COBBLESTONE MARKET deli meat and mustard, served with COBBLESTONE MARKET chips or COBBLESTONE MARKET soup, and a COBBLESTONE MARKET pickle. Indeed, Applicant's president conceded as much:

Q. . . . So, for sandwiches, the company might provide the components for a sandwich?

A. It's possible an operator would buy all the components for a sandwich, including [Flowers'] bread distributed through our companies.

....

Q. . . . Would your customers purchase deli meats and bread during the same time period?

A. Our customers would purchase all their use items, including . . . foods . . . , during a similar period of time

Q. Okay, would that also apply to mustard and bread?

A. Yes, it would.

Q. Cheese and bread?

A. It would apply to any product that they would consume and use in their business?

. . . .

Q. Okay. Would you consider sandwiches and bread to be related items?

A. They are components that somebody used together or separately; so, you know, there is some relationship between those, as there is between mustard and ham and mustard and bread. They could be used together under some circumstances.

Q. Cheese and bread as well?

A. Any item that could conceivably use bread could be related to any other item, including cheese.

(Planck Dep. Vol. I at 49; Planck Dep. Vol. I at 66-67.)

Under virtually identical circumstances, the Board has held that "bread and prepared meats are complementary products which are often prepared and consumed together, principally in sandwich form." *In re Colonial Stores, Inc.*, 216 U.S.P.Q. 793, 794 (T.T.A.B. 1982) (finding likelihood of confusion between COUNTRY PRIDE for bread and COUNTRY PRIDE for prepared meat products). It has similarly held that the "[u]se of bread together with cheese, whether in sandwich form or as a snack or hors d'oeuvre base..., is a frequent and normal food consumption practice," and thus favors "the kind of product association that we believe would lead purchasers and consumers to assume a common source." *In re Martin's Famous Pastry Shoppe, Inc.*, 221 U.S.P.Q. 364, 366-67 (T.T.A.B. 1984) (finding likelihood of confusion between prior-registered MARTIN'S FAMOUS PASTRY SHOPPE INC. and MARTIN'S marks for bakery products and MARTIN'S mark for cheese); *see also In re Campbell Taggart, Inc.*, 183 U.S.P.Q. 755, 755-56 (T.T.A.B. 1974) (finding likelihood of confusion between "different composite

marks whose most prominent feature is 'Bimbo' on applicant's bread and cakes and on registrant's fresh vegetables and melons").

Moreover, even if the parties' marks were not already used in connection with complementary goods, the opposition must be sustained under the expansion of trade doctrine. Under this doctrine, a trademark owner is entitled to protection against the registration of a similar mark on products it reasonably might produce in the normal expansion of the owner's business. *Brunckhorst Co. v. G. Heileman Brewing Co.*, 35 U.S.P.Q.2d 1102, 1111 (E.D.N.Y. 1994) (finding "competitive proximity" between defendant's beer and plaintiff's meat and cheese products) ("[C]onsumers are as aware as businessmen that companies frequently cross product lines and manufacture products in different facilities which complement each other in the market place."). It is not unusual for brand owners in the food and beverage industry to expand their line of products. For example, Sara Lee not only offers baked goods, including breads, buns, and rolls, but also offers deli products, including deli meats, cheese, and mustard. (See Anderson Dep. Vol. II at 10-11.) Thus, as Applicant's Director of Marketing has acknowledged, consumers encountering similar marks in connection with deli meats and bread are likely to assume that the goods come from the same source:

Q. Are you aware that Sara Lee sells meat items?

A. Yes.

Q. Are you aware that Sara Lee also has a line of bread items?

A. Yes.

Q. . . . Would you be surprised if a consumer thought that Sara Lee Bread and Sara Lee Meat came from the same company?

A. No.

Q. Is that something you would expect?

A. What?

Q. That a customer encountering Sara Lee Bread and Sara Lee Meat would assume it was the same company?

A. They - I assume they would believe it's the same company.

(Fontana Dep. Vol. II at 49.) Thus, it would be an expected and natural development of Flowers' business to expand its goods to include not only breads, buns, and rolls, but also companion or complementary goods, such as deli meats, cheese, mustard, salads, chips, or pickles. Because Applicant's goods not only are similar to those offered by Flowers, but are in Flowers' natural area of expansion, consumers will assume mistakenly that Applicant's goods originate from or are authorized by Flowers.

(c) The Parties' Channels Of Trade Overlap.

In *inter partes* proceedings involving unrestricted claims, the Board need not entertain the argument that the parties use or occupy different channels of trade. Rather, registrability is based on the "identification of goods set forth in the application regardless of what the record may reveal as to ... the class of purchasers to which sales of the goods are directed." *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990); *accord J&J Snack Foods Corp. v. McDonalds Corp.*, 932 F.2d 1460, 1463 (Fed. Cir. 1991); *Helene Curtis Indus.*, 13 U.S.P.Q.2d at 1623. As a matter of law, therefore, an application of this factor weighs in favor of a finding of likely confusion.

Beyond this *legal* rule, the *facts* of this case mandate the same conclusion. Both Flowers and Applicant offer their goods to the same consumers through the same channels of trade. Flowers' consumers include in-store and supermarket delicatessens, a channel of distribution that Applicant has acknowledged is an increasingly important one for Applicant's members. (*See* Fontana Dep. Vol. II at 39-40; Flowers' First Not. of Reliance, Ex. 4.) Applicant has likewise conceded that it provides point-of-purpose materials promoting its products and bearing its mark that are viewed by end lay consumers. (Fontana Dep. Vol. I at 20-21, 23; Fontana Dep. Vol. II at 31-38.)

In particular, Applicant has acknowledged that its goods are viewed by the ultimate consumer in at least two different settings: kiosks and delis.

Q. Are there plans to use the Cobblestone mark in connection with the kiosks?

A. Yes, there are.

Q. So, the kiosks presentation would be one in which the ultimate consumer would be exposed to trademarks used on the kiosks?

A. Yes, they would be exposed to the trademark and the component products –

Q. Okay.

A. – that were displayed and sold there.

Q. For those of your customers that operate delis, are the goods sold in those delis ever displayed to consumers, the ultimate consumers, in a way that displays the trademarks?

A. For operators that have display cases that are conveying a purely deli image, the answer would be yes.

(Planck Dep. Vol. I at 51-52.)

Even excluding Flowers' sales to foodservice consumers, Flowers' goods still are offered through retail channels that overlap with Applicant's channels of trade, as Flowers' goods also are offered in grocery bakery departments, and Applicant's goods would be offered in grocery delicatessens, which almost always are located in or near the grocery bakery departments.

(d) The Marks Appear On Relatively Inexpensive Goods Purchased By Consumers Exercising A Lesser Standard Of Care In Making Purchasing Decisions.

The parties are using their respective marks on food items, including breads and deli meat, which are inexpensive goods:

Q. Going back to the items that we discussed earlier being offered in connection with the Cobblestone Market mark, can you give me some examples of the typical price points that those products are being offered at?

...

Q. ... Deli meats, for example, on a per pound basis?

A. On a per pound basis, probably within the three-, four-, five-dollar-a-pound range....

Q. What about cheeses?

A. Cheese, again, probably in that three-, four-, or five-dollar-a-pound range....

(Fontana Dep. Vol. I at 26-27; *see also* Fontana Dep. Vol. II at 38 (characterizing sandwiches made from Applicant's components as retailing for three dollars).) Flowers' goods are similarly modestly priced, both at wholesale and retail. (Anderson Dep. Vol. II Ex. 11.)

Because of the low cost of these items, consumers are not likely to spend a significant amount of time in deciding which brand of goods to purchase, and are likely to exercise a lesser standard of care. The low cost of such food items and the rather casual manner in which they are usually purchased only expand the opportunities for confusion. *See Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000) ("When the products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care"); *Kimberly-Clark Corp. v. H. Douglas Enters.*, 774 F.2d 1144, 1146 (Fed. Cir. 1985) (when relatively inexpensive and replaceable products are sold to the same customers, purchasers are held to a lesser standard of purchasing care) (citing *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984)). Accordingly, this factor also weighs heavily in favor of finding a likelihood of confusion. In this case, there is no genuine issue as to the relatively inexpensive nature of these products.

(e) Flowers' COBBLESTONE MILL Marks are Strong and Entitled to Broad Protection.

Confusion is likely because Flowers' marks are strong, and therefore entitled to a broad scope of protection. Not only are the COBBLESTONE MILL Marks inherently strong, but their strength has increased through extensive use, promotion, and sales. As the fifth, ninth, and eleventh *du Pont* factors suggest, the stronger the mark, the greater the scope of protection. *Kenner Parker Toys, Inc. v. Rose Art Indus.*, 963 F.2d 350, 352 (Fed. Cir. 1992) ("[S]trong marks enjoy a wide latitude of legal protection."); *Frehling Enters. v. Int'l Select Group, Inc.*, 192 F.3d 1330, 1335 (11th Cir. 1999) (reversing judgment for defendant and holding that plaintiff established

likelihood of confusion between marks). In addition, “registered trademarks are presumed to be distinctive and should be afforded the utmost protection.” *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 871 (2d Cir. 1986). Because Flowers owns federal registrations of its marks, they are presumptively strong and entitled to an expansive scope of protection.

Flowers’ marks are entitled to broad protection against the use of similar and, in particular, nearly-identical terms and designs. Indeed, the Federal Circuit has recognized that “[a] strong mark...casts a long shadow which competitors must avoid.” *Kenner Parker Toys*, 963 F.2d at 355 (finding a likelihood of confusion between PLAY-DOH and FUN DOUGH given the marks’ similarity in appearance, sound, and meaning). Flowers’ rights certainly extend to Applicant’s use of a mark that incorporates as the first and prominent term a term that is *identical* to the first term of Flowers’ mark for goods that are closely-related and would be offered or sold together with Flowers’ goods, and at minimum are goods that consumers very likely would attribute to or associate with Flowers. *See, e.g., Tiffany & Co. v. Classic Motor Carriages Inc.*, 10 U.S.P.Q.2d 1835, 1843 (T.T.A.B. 1989) (finding CLASSIC TIFFANY for automobiles confusingly similar to TIFFANY for jewelry, silver, and similar items); *R.J. Reynolds Tobacco Co. v. R. Seeling & Hille*, 201 U.S.P.Q. 856, 860 (T.T.A.B. 1978) (holding SIR WINSTON & Design for tea likely to cause confusion with WINSTON for cigarettes).

Because trademark rights are not static, widespread use and promotion serve to strengthen an already strong mark by solidifying consumer recognition of the trademark owner as the source of the goods or services offered under the mark. *See E. Remy Martin & Co. v. Shaw-Ross Int’l Imports, Inc.*, 756 F.2d 1525, 1533 (11th Cir. 1985) (citing “extensive promotion” as evidence of the mark’s strength).

Moreover, successful advertising and promotional efforts have created strong recognition in Flowers' marks among the relevant public. *See, e.g., President & Trustees of Colby Coll. v. Colby Coll.-N.H.*, 508 F.2d 804, 808 (1st Cir. 1975) ("While secondary meaning is shown by the success rather than by the mere fact of an enterprise's promotional efforts, the normal consequence of substantial publicity may be inferred."). Flowers has expended substantial sums promoting its COBBLESTONE MILL goods and has advertised in a variety of media, which further demonstrates the commercial strength of the COBBLESTONE MILL Marks. Flowers spends significant sums each year promoting its COBBLESTONE MILL goods. For example, in 2006, Flowers spent over \$400,000 advertising COBBLESTONE MILL goods, and the 2007 advertising budget was \$600,000. (*See* Anderson Dep. Vol. II at 76.) Flowers' COBBLESTONE MILL goods have been advertised in various magazines with national distribution of over five million readers, in grocery and retail stores, and at cooking and other special events. (*See id.* at 9-10, 46-47.) Flowers also promotes the COBBLESTONE MILL marks and the goods offered under those marks on its web sites at www.flowersfoods.com and www.cobblestonemill.com. (Anderson Dep. Vol. I Ex. 1, Opposer's First Not. of Reliance, Ex. 9.) Flowers' extensive advertising activity provides undisputed evidence of the strength and widespread fame of the COBBLESTONE MILL Marks. *See Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002) ("[W]e have consistently accepted statistics of sales and advertising as indicia of fame; when the numbers are large; we have tended to accept them without any further supporting proof.").

Flowers' sales of goods under the COBBLESTONE MILL Marks further reinforces and increases the strength of the marks. For example, in August 2006, Flowers' anticipated annual sales of COBBLESTONE MILL goods for 2006 were \$105,000,000, and Flowers' annual sales

for 2005 were approximately \$100,000,000. (See Anderson Dep. Vol. I at 26.) See *Bose Corp.*, 293 F.3d 1367 (finding sales numbers to be an indicia of fame); see also *Kenner Parker Toys*, 963 F.2d at 351 (\$30 million of PLAY-DOH sales in 1988, \$2 million in advertising expenditures that year); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 675 (Fed. Cir. 1984) (\$12 million of sales of SPICE ISLAND products over 24 years, and several millions of dollars of advertising expenditures).

Flowers' COBBLESTONE MILL Marks therefore not only are inherently strong but have increased in strength due to Flowers' extensive use and promotion of the marks, and sales of goods under the marks. This factor therefore weighs heavily in favor of Flowers.

(f) Flowers' and Applicant's Goods Interface Directly in the Marketplace.

Confusion is additionally likely because Flowers and Applicant have a preexisting relationship in the marketplace. Specifically, both parties agree that at least some of Applicant's members/owners purchase Flowers' goods, albeit those not bearing Flowers' COBBLESTONE MILL mark, and distribute them through their networks. (See Fontana Dep. Vol. II at 47-48.) As Applicant's president testified:

Q. Okay. So, for sandwiches, the company might provide the components for a sandwich?

A. It's possible an operator would buy all the components for a sandwich, including Flowers breads distributed through our companies.

(Planck Dep. Vol. I at 49.) This marketplace interface weighs in favor of a finding of likely confusion. See, e.g., *Sun-Fun Prods., Inc. v. Suntan Research & Dev., Inc.*, 656 F.2d 186, 191 (5th Cir. Unit B. 1981) (finding of likely confusion as a matter of law based in part on past manufacturer-distributor relationship between parties).

(g) Applicant has Acted in Reckless Disregard of Flowers' Rights.

It is well settled that a newcomer who adopts a new trademark has the burden to stay as far afield from existing marks as possible to reduce the likelihood of confusion. A newcomer's failure to do so will result in any doubts being resolved against it.

In the present case, not only has Flowers used its COBBLESTONE MILL marks for more than twenty-five years prior to Applicant's adoption of the COBBLESTONE MARKET mark, Applicant *was aware* of Flowers and its rights in the COBBLESTONE MILL mark. Nonetheless, Applicant charged forward with its application to register, and adoption of, the COBBLESTONE MARKET mark, despite being aware of Flowers as a prior user of the COBBLESTONE MILL mark for similar goods.

Prior to filing its application for the COBBLESTONE MARKET mark, Applicant was advised of Flowers' rights in its COBBLESTONE MILL Marks, but chose to disregard those rights and proceed with an application it knew was accompanied by a certain amount of risk. Flowers' COBBLESTONE MILL mark was revealed by an availability search for Applicant's proposed mark COBBLESTONE CORNER, and Applicant's counsel advised that "[a]ssuming publication for opposition, the owner of the 'Cobblestone Mill' mark for bakery products...could try to oppose registration – note that the owner of 'Cobblestone Mill' mark is Flowers Bakeries Brands, Inc." (Fontana Dep. Vol. I at 13-14 and Ex. 2.) As Applicant was well-aware of Flowers' prior rights in its COBBLESTONE MILL Marks and chose to assume that risk in adopting the mark COBBLESTONE MARKET, this factor favors Flowers and calls for the refusal of Applicant's application.

(h) Any Doubt Must Be Resolved Against Applicant.

Any doubts regarding the existence of a likelihood of confusion must be resolved in favor of the prior user. See *Lone Star Mfg. Co., Inc. v. Bill Beasley, Inc.*, 498 F.2d 906, 909 (C.C.P.A. 1974). The Federal Circuit repeatedly has confirmed this interpretation of the law. In *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 676, 223 U.S.P.Q. 1281 (Fed. Cir. 1984), the court upheld the following statement by its predecessor court:

The law has clearly been well settled for a longer time than this court has been dealing with the problem to the effect that the field from which trademarks can be selected is unlimited, that there is therefore no excuse for even approaching the well-known trademark of a competitor, that to do so raises "but one inference -- that of gaining advantage from the wide reputation established by appellant in the goods bearing its mark," and that all doubt as to whether confusion, mistake, or deception is likely to be resolved against the newcomer, especially where the established mark is one which is famous and applied to an inexpensive product brought by all kinds of people without much care.

Specialty Brands, Inc., 748 F.2d at 676, 223 U.S.P.Q. at 1285; see also *Nina Ricci, S.A.R.L. v. E.T.F. Enters.*, 889 F.2d 1070 (Fed. Cir. 1989); *Kenner Parker Toys*, 963 F.2d 350.

(i) Summary

Considering these pertinent *DuPont* factors, purchasers are likely to be confused and assume mistakenly that Applicant's goods originate from or are endorsed or authorized by Flowers.

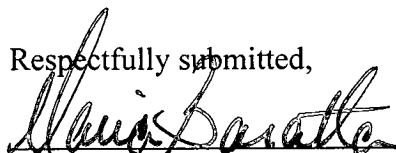
CONCLUSION

The evidence of record clearly shows that Applicant's mark should be refused on the basis that Applicant has committed fraud on the U.S. Patent and Trademark Office because it did not possess the requisite bona fide intent to use the mark for certain goods covered by its application at the time of publication. Further, Applicant's COBBLESTONE MARKET mark for deli meats, cheese, chips, pickles, and other goods is confusingly similar to Flowers' COBBLESTONE MILL Marks for breads and baked goods. Thus, because Applicant's mark is likely to

be confused with Flowers' COBBLESTONE MILLS Marks, the Board should sustain the opposition and deny registration to Applicant's mark.

This 10th day of March, 2008.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Theodore H. Davis Jr.", written over a horizontal line.

Theodore H. Davis Jr.

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Attorneys for Opposer

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FLOWERS BAKERIES
BRANDS, INC.,

Opposer,

v.

INDEPENDENT MARKETING
ALLIANCE LP,

Applicant.

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Opposition No. 91167151

Mark: COBBLESTONE MARKET

CERTIFICATE OF SERVICE

This is to certify that on this date, the foregoing document was served upon Applicant by depositing a copy thereof in the United States mail as first class mail, postage pre-paid, addressed as follows:

Martyn B. Hill, Esq.
Pagel, Davis & Hill, P.C.
1415 Louisiana, 22nd Floor
Houston, Texas 77002

This the 10th day of March, 2008.


Olivia Maria Baratta